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No. 73-267

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In the Supreme Court of the United States

OCTOBER TERM, 1973

DAVID H. BARAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In January 1966, petitioner was removed from his employment in the competitive service with the Federal Aviation Administration for inefficiency, under procedures authorized by the Lloyd-LaFollette Act, 5 U.S.C. 7501, and the governing regulations of the Administration and the Civil Service Commission. Under these procedures, petitioner had an opportunity to respond to the agency's charges orally and in writing prior to removal, and he responded in writing, challenging the charge of inefficiency but raising no procedural objections to the proceedings against him. Following petitioner's removal, he appealed within the Administration, where he was granted a trial-type, evidentiary hearing pursuant to 5 C.F.R. Part 771, and after that hearing his removal was sustained by the Associate Administrator. Thereafter petitioner appealed to the Commission for *de novo* consideration under 5 C.F.R. Part 772. After

another full evidentiary hearing, the removal was upheld by the Appeals Examining Office in October 1968, and then by the Board of Appeals and Review in April 1969.

In November 1971, petitioner instituted the present action in the Court of Claims seeking back pay for his allegedly wrongful removal. Petitioner challenged the factual basis for the removal and contended, for the first time, that his removal prior to the holding of a full evidentiary hearing constituted a denial of procedural due process.

The Court of Claims dismissed the petition, holding that the administrative action was supported by substantial evidence in the record and that the procedural errors relied upon by petitioner had not been timely or adequately raised (Pet. App. 4-5).

1. Petitioner's principal contention is that the Lloyd-LaFollette Act and the governing regulations violate the Due Process Clause of the Fifth Amendment in not requiring a trial-type, evidentiary hearing prior to removal of a non-probationary federal employee in the competitive service. This question is now before this Court in *Arnett* v. *Kennedy,* No. 72-1118, probable jurisdiction noted April 2, 1973. However, we do not believe this petition should be held pending disposition of *Kennedy.* In *Kennedy,* the discharged employee timely raised his procedural claim prior to removal, and the validity of that removal was never tested in a full evidentiary hearing. Here, by contrast, petitioner did not raise a due process challenge to the governing removal procedures at the administrative level, and the subsequent hearings, especially on *de novo* consideration by the Commission, removed any suggestion of unfair-

ness or inaccuracy that might otherwise have attached to the original administrative determination.

Thus, even if this Court should rule against the government in *Kennedy*, it would be inappropriate to require reinstitution of this removal proceeding, more than seven years after removal, on the basis of newly raised contentions relating to alleged procedural defects which were waived at the outset and, in any event, have been substantially cured.

2. Petitioner's other contentions relate principally to the factual basis for his removal. As the court below correctly held, there was substantial evidence to support the independent findings by the Administration and the Commission that petitioner had been inefficient; this evidentiary question warrants no further review.[1]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[1] Petitioner's further contention that the initial decision is invalid because rendered by the official who also proposed his removal is without merit. *Studemeyer* v. *Macy*, 321 F. 2d 386 (C.A.D.C.), certiorari denied, 375 U.S. 934. It should be added that, unlike the related contention made in *Kennedy*, petitioner does not make a specific charge of bias against the initial decision-maker, resting instead only upon the view that the official's role as initiator of the removal in itself disqualifies him from deciding, in the first instance, the merits of the removal action.

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